IN THE SUPREME COURT OF MISSOURI

No. SC86022

SCANWELL FREIGHT EXPRESS STL, INC.,

Respondent

v.

STEVIE CHAN and DIMERCO EXPRESS (U.S.A.) CORP.,

Appellants

On Appeal From The Circuit Court For The Twenty-First Judicial Circuit
St. Louis County, Missouri
Division 5
Honorable John F. Kintz

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JURISDICTIONAL STATEMENT

Plaintiff Scanwell Freight Express STL, Inc. brought this suit against defendants Stevie Chan and Dimerco Express (U.S.A.) Corp. alleging that Chan breached her fiduciary duties as a Scanwell employee by taking certain actions before she resigned, and alleging that Dimerco conspired with Chan to breach her fiduciary duties. The case was tried to a jury which returned a verdict in favor of Scanwell and against Chan for $54,000 and against Dimerco for $254,000.

Chan and Dimerco appealed the judgment to the Missouri Court of Appeals, Eastern District, invoking the court's general appellate jurisdiction under Article V, § 3 of the Missouri Constitution. That Court reversed the judgment and ordered a new trial. Scanwell sought transfer of the appeal under Rule 83.04, which the Court granted. The Court has jurisdiction of this appeal under Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

Scanwell Freight Express STL, Inc. is a subsidiary of Scanwell International that was organized to operate a freight forwarding office in St. Louis. A freight forwarder works with both exporters and importers to provide air and ocean transportation for the shipment of goods — in this case from Asia to the United States. T. 161. Dimerco Express (U.S.A.) Corp. is also a freight forwarder specializing in the transportation of goods from Asia to the United States, and it is one of Scanwell's competitors. T. 162.

Stevie Chan is a native of Hong Kong. T. 658. She came to the United States in 1985. T. 661. Chan became involved in the freight forwarding business in Chicago. T. 666. Later, she moved to St. Louis, where she worked for a freight forwarding company, Fritz, that was a competitor of both Scanwell and Dimerco. T. 671. In 1996, she left Fritz because that company wanted her to move to Seattle. T. 675. She was hired by Scanwell to open an office in St. Louis, where Scanwell had not previously had a presence. T. 436, 677-679.

Chan was the St. Louis branch manager. T. 440. She was not an officer or director of Scanwell. As branch manager, she reported to M.B. Hassan, a vice-president of Scanwell International and the head of Midwest operations for Scanwell. T. 441. As branch manager Chan had no authority to hire employees or give them raises on her own. She could make recommendations but all decisions were Hassan's, who reserved all hiring, compensation and contracting authority to himself. T. 446, 448-449. Neither Chan nor any of the Scanwell St. Louis employees were asked to sign, or did sign, a written employment agreement or covenant not to compete. T. 1262.

In 1998, the business had expanded to the point where Scanwell needed more space for its St. Louis office. Chan asked the landlord, James West of McKee Realty, about a larger suite in the same building. T. 684, 1490. She inquired only about the monthly rental and the size of the space. T. 1491. West prepared a lease which had the "standard" terms for all of his tenants. T. 1489. Chan sent the lease to the Chicago office for approval, which was received. T. 535-537. On May 13, 1998, Chan signed the lease on behalf of Scanwell. T. 534; Pl. Ex. 20.

The lease had a three-year term, with an option to renew that had to be exercised in writing by the tenant not later than four months before the expiration of the term. Pl. Ex. 20. The lease originally provided for the lease to commence on May 31, 1998 and to expire on May 31, 2001 — thus requiring notice of the exercise of the option to renew by January 31, 2001. T. 1490-1493; Pl. Ex. 20. About two weeks after the lease was originally signed, West, on the advice of his accountant, asked Chan to change the term of the lease to commence on April 1, 1998 and to end on March 31, 2001. T. 1493. Scanwell had been occupying the new space for some period prior to the formal entry into the lease. T. 1540-1542. In addition, West said that his accountant advised that it would be helpful for the lease to be changed because it was "out of sequence" from the prior lease, which commenced in April 1996. T. 1493. Accordingly, the lease was amended to change the term to end March 31, 2001. Pl. Ex. 20. This had the effect of moving the date for the exercise of the option to renew back to December 1, 2000. Chan sent the revised lease to Chicago shortly after it was signed, T. 687, but she did not get specific prior permission to sign the amendment. T. 537.

The St. Louis office showed a small profit in the second year of operations. Pl. Ex. 22. Although it suffered a financial setback in 1999, the St. Louis office returned to profitability the following year. Pl. Ex. 22. Nonetheless, Chan became dissatisfied with working for Scanwell. There were various internal business issues that concerned her and she became fearful that Dennis Choy, the president of Scanwell, would close the St. Louis office. T. 717-727. Hassan tried to allay her fears, even to the point of suggesting that he would finance her purchase of the St. Louis office from Scanwell as a "silent partner" so that Chan could operate as the owner of the business and a Scanwell agent. T. 726. Some of the offices Scanwell had closed up to that point had been taken over by the local employees who then stayed in the Scanwell "network" as agents.

T. 1225-1227. Chan, however, declined to pursue Hassan's proposal, even though he renewed it on more than one occasion. T. 730, 744-745.

In July 2000 Dimerco employee Kurt Brydenthal visited Chan. T. 180. He had heard of her dissatisfaction with Scanwell and inquired as to the possibility of Chan opening an office for Dimerco in St. Louis. Chan showed some interest in the proposal. T. 180. On August 9, 2000, Anthony Tien, Dimerco's general manager in its Chicago office, and Brydenthal met with Chan in St. Louis. T. 182; Pl. Ex. 1. Chan gave them a brief tour of Scanwell's office. T. 327-328. Tien asked Chan to submit a business plan for a new Dimerco office. T. 183.

Shortly thereafter, Chan prepared a business proposal that was a forecast of revenues, costs, expenses and profits. Pl. Ex. 6. She based her forecast on her knowledge of the freight forwarding business and her expectations as to what could be done in St. Louis. T. 640. Chan did not use or base her forecast on any Scanwell financial data. T. 319-320, 641, 740-741. Chan's proposal did not identify where the proposed office would be located. She proposed bringing all of the St. Louis employees with her, but with the exception of her boyfriend and sister (both of whom also worked for Scanwell), she did not tell anyone in the St. Louis office that she was considering leaving. T. 780.

Chan sent Tien a copy of the customer profile, or SOP, for InterGlobal, Inc., one of Scanwell's major customers. T. 220; Pl. Ex. 5. Chan obtained InterGlobal as a customer when she worked for Fritz, and brought the company as a customer with her after being hired by Scanwell. T. 674-675.

Chan developed an SOP for each customer she had. T. 653. This was a form that was her innovation — not something she learned at Scanwell. T. 771-775. The SOP conveniently collected in one place all of the pertinent information about the customer — its name, address, telephone number, contact information, preferences, special handling requirements and rates. Most of this information is publicly available, or readily obtainable from the customer itself. T. 771-776. In any event, Chan was so familiar with her customers that she could recreate the information "from her head." T. 654, 772.

Scanwell's specific complaint about the InterGlobal SOP was that it showed the rates Scanwell charged. T. 224. The ocean rates, however, (more than 90% of InterGlobal's business) were publicly available because Scanwell had to file them with the Federal Maritime Commission. T. 347-349, 360. Only the air freight rates were something competitors could not get from public sources other than the customer. T. 404.

InterGlobal had its own copy of the Scanwell SOP. T. 775-776, 1617. William Shiang, InterGlobal's manager of international operations, testified that he regularly showed the SOP to Scanwell's competitors as a way to pit one against the other to obtain a better price. T. 1618-1620. Thus, the information in the InterGlobal SOP was not actually secret, even if Scanwell considered it confidential.

By an e-mail dated October 12, 2000, Tien's boss authorized him to work out a deal with Chan. T. 192. On November 17, 2000, Tien, Brydenthal and Roy Chen (the president of Dimerco) had a conference call to discuss the "pros and cons" of hiring Chan to open a St. Louis office. T. 201-202. One of the "pros" was that Chan proposed bringing with her the Scanwell St. Louis employees. T. 203. That was a "pro" as far as the customers were concerned because the employees already had relationships with them. T. 203. It was also considered a "con" because the employees had their own office culture and background that might cause a problem fitting in with Dimerco's operations. T. 204. Although Brydenthal at one point said that Chan expected to resign from Scanwell in December 2000, she did not do so.

Chan met with Tien, Dimerco's assistant general manager and export manager in Chicago on January 8, 2001 to become acquainted with them. T. 208-212. They also introduced her to Dimerco's proprietary computer programs and provided her with information regarding employee benefits. T. 210.

On January 15, 2001, Tien consulted with Dimerco's attorney to make sure there were no legal complications. They reported that she did not have an employment contract or a non-compete agreement with Scanwell. T. 212.

In the meantime, Chan was working hard for Scanwell and increasing its profits. The Scanwell St. Louis office enjoyed a profitable 2000, earning a profit of $109,000 on revenues of $6.1 million. T. 470; Pl. Ex. 22. Scanwell's January 2001 figures were even better, with the company earning profits of $25,000 that month — the best month the company ever had in St. Louis. T. 841. Chan and her staff worked 70-80 hours per week during January 2001. T. 743, 839. Even Hassan admitted that she always put forward her best efforts for Scanwell. T. 1245.

Nevertheless, Chan was still unhappy. She testified that Hassan told her once again in January 2001 that Scanwell was planning to close the St. Louis office, and that he offered to finance her purchase of the office to run it as Scanwell's agent. Once again, she declined the proposal. T. 744-746. This did, however, solidify her intention to leave Scanwell for Dimerco. On January 29, 2001, she called Tien and told him that she was leaving Scanwell and wanted to pursue employment with Dimerco on the terms they had previously discussed. T. 489, 750.

Chan did not tell anyone at Scanwell's Chicago office that she had made that decision before she submitted her resignation letter, except for her friend, Lorraine Ko. T. 490. Ko apparently did not tell Hassan or anyone else in Chicago.

Chan sent the original lease and the revised lease, both of which had the option clause, to Chicago in 1998. T. 687. Chan did not remind anyone at Scanwell in 2000 that the option to renew the lease would expire on December 1, 2000. T. 539-540. No one at Scanwell instructed or authorized her to extend the lease that was due to expire on March 31, 2001. No one instructed or authorized her to exercise the option on or before December 1, 2000, or, for that matter, before January 31, 2001 — the original option date, even though the Chicago office (which had to approve all such transactions) had copies of the documents since 1998.

In early February (after Scanwell's option to renew expired) Chan talked to the landlord, obtained a proposed lease for the same premises that Scanwell occupied, and sent it to Tien for Dimerco to approve. T. 532-533. That approval came back on February 15, 2001 and Chan signed the lease for Dimerco on February 15, 2001. Pl. Ex. 7.

Shortly before submitting her resignation, Chan visited a customer in Kansas. She and the customer testified that Chan mentioned that she was leaving Scanwell and that others in the Scanwell office — specifically, Howard Xa — would service the account.

T. 609, 611, 613-614, 1571-1572. Chan did not tell the customer where her new employment would be. T. 1572. After her employment with Scanwell ended, Chan called the customer to tell her that she was now working for Dimerco. T. 1575. Chan testified that she had a similar conversation with another Scanwell customer in Oklahoma. T. 619. Later, both customers switched their business to Dimerco, the Kansas customer doing so after becoming dissatisfied with the service Scanwell provided after Chan left the company. T. 1572-1575, 1576-1578.

Chan submitted her formal resignation to Scanwell on February 20, 2001, effective March 1, 2001. Pl. Ex. 21. She also wrote a “personal” resignation to Hassan, with whom she had been very close. Pl. Ex. 23. Chan attached the profit and loss statement for the St. Louis office to her resignation letter. T. 751-752. She also attached forms for switching the authority to sign checks for the company at the local St. Louis bank it used. T. 494-495.

Chan told Hassan that Sandy Chan, her sister and the office’s accounting manager, would stay on to work with the Chicago office on accounting matters because St. Louis used different software. T. 755-756. She also told Hassan that the operations people would stay to finish all existing business. T. 756-757. She told him that the customer profiles were saved in the computers for Scanwell’s future use. T. 757.

Hassan was shocked by Chan’s resignation. T. 1113. After discussing the matter with Choy, Hassan came to St. Louis on February 27 to try to talk Chan out of her decision. T. 1122 She would not change her mind. Hassan testified that he learned for the first time on this trip that the lease would expire. T. 1125-1126. Hassan spoke to West (the landlord) and found out that the Scanwell space had already been leased. T. 543, 1125. West testified that he had other space available in the same building that had been listed since November 2000 (and wasn't actually leased until October 2001), but Hassan made no inquires as to whether there was alternate space available for a Scanwell office. T. 1501, 1504, 1539.

Hassan again proposed that Chan buy the St. Louis office with his financial help, but she turned him down for the last time on March 7 via an e-mail. Pl. Ex. 24. After receiving the e-mail, Hassan called Chan and told her that he had decided to close the St. Louis office. T. 766-767. On March 8 Hassan sent a letter to all Scanwell St. Louis employees telling them that the office would be "reorganized and all business transactions will be handled by [the] Chicago office due to the resignation of Stevie Chan." Ex. 26; T. 1135-1136.

On March 21, Marcy Rivera, a Scanwell employee in Chicago, sent a letter to each of the St. Louis employees stating: "We find it necessary to lay you off as we have no position available for you due to the February 28, 2001 resignation of Stevie Chan, manager of our St. Louis office. We have decided to close the facility effective April 1, 2001; therefore we are required to lay off our entire staff of our St. Louis facility." Ex. 28; T. 1071-1072. Both Hassan and Choy testified that Rivera was not authorized to send the letter and that it erroneously said that the St. Louis employees were laid off, but plaintiff offered no explanation as to why she sent it. T. 1072, 1143. There was no evidence that Scanwell made any attempt to "correct" the letter by notifying the employees of the alleged erroneous statements.

Chan testified that she didn't talk to any of the employees about working for Dimerco until after this letter was sent. T. 781. Chan met with Roy Chen on March 24, when he formally offered her the job as St. Louis branch manager for Dimerco. T. 781-782. Chan then offered the St. Louis employees the same positions working for Dimerco (but not without some opposition from Tien who did not want to hire all of them). T. 782.

Chan worked with Ko in the Chicago office on various transition matters. There were penalties in the Scanwell office equipment leases that were avoided when Dimerco, with Scanwell's permission, took them over. T. 784-787. Scanwell's St. Louis telephone number was supposed to be set up to ring at the Chicago office. T. 789. The telephone company, Birch Telecom, made some sort of error that allowed the telephone to ring at the Dimerco St. Louis office. T. 789-794; Deft. Exs. 37, 39. When Chan found out about the problem, she immediately took action to correct it. T. 791-792; Deft. Exs. 37, 39. Chan made sure that all of Scanwell's files, including its customer profiles and all computer data, was shipped to Chicago. T. 769, 1188. There was no evidence that she kept or took any Scanwell documents with her to Dimerco.

POINTS RELIED ON

I.

The Trial Court Erred In Denying Appellants' Motion For Judgment Notwithstanding The Verdict Because Respondent Failed To Make A Submissible Case In That It Failed To Present Any Evidence From Which The Jury Could Reasonably Find That Chan Owed A Fiduciary Duty Concerning The Lease Or That She Breached Any Such Duty, Inasmuch As An At-Will Employee's Mere Preparation To Leave Her Employment, Including Entering Into A Lease Of Office Space, Is Insufficient To Show A Breach Of Fiduciary Duty.

Nat'l Rejectors, Inc. v. Trieman, 409 S.W.2d 1 (Mo. banc 1966)

Dwyer, Costello and Knox, P.C. v. Diak, 846 S.W.2d 742 (Mo. App., E.D. 1993)

Schmersahl, Treloar & Co., v. McHugh, 28 S.W.3d 345 (Mo. App., E.D. 2000)

II.

The Trial Court Erred in Denying Appellants' Motion for Judgment Notwithstanding the Verdict on the Issue of Damages Because Respondent Failed to Present Any Evidence of Damages Arising From the Alleged Misappropriation of Its Office Lease, Inasmuch as the Only Damage Evidence Respondent Offered Was for the "Diminution in Value" of the St. Louis Office Allegedly Resulting From an Aggregate of Purported Offenses, Rather Than Increased Rent or Other Losses Caused Specifically by the Alleged Misappropriation of the St. Louis Office Lease.

Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997)

Boyer v. Sinclair & Rush, Inc., 67 S.W.3d 627 (Mo. App., E.D. 2002)

White v. Pruiett, 39 S.W.3d 857 (Mo. App., E.D. 2001)

III.

The Trial Court Erred in Denying Dimerco's Motion for Remittitur or, Motion for New Trial on the Issue of Damages Because the $254,000.00 Verdict Against Dimerco Was Inconsistent With the $54,000.00 Verdict Against Ms. Chan and Was Not Reasonably Calculated to Fairly Compensate Respondent But, Rather, Was Designed to Punish Dimerco in That Even Though Dimerco Was Held Liable as a Co-Conspirator, and Even Though the Damages Resulting From a Conspiracy Cannot Exceed the Damages Resulting From the Underlying Alleged Tort, the Verdict Against Dimerco Exceeded By $200,000.00 the Amount of Damages the Jury Arguably Concluded Respondent Suffered as a Result of the Underlying Alleged Tort

Gettings v. Farr, 41 S.W.3d 539 (Mo. App., E.D. 2001)

Mills v. Murray, 472 S.W.2d 6 (Mo. App., 1971)

Roysten v. Baker, 365 S.W.2d 496 (Mo. 1963)

Rice v. Hodapp, 919 S.W.2d 240 (Mo. banc 1975)

IV.

The Trial Court Erred in Denying Appellants' Motion for Mistrial and Motion for New Trial Because Appellants Were Unfairly Prejudiced by the Misconduct of Respondents' Counsel When He Invited the Jury to Infer From Appellants' Choice of Counsel That Appellants "Knew They Had Done Something Wrong," in That a Jury May Not Draw Any Adverse Inference From the Defendants' Choice of Lawyers, the Remark Was an Appeal to the Jury's Prejudices on a "Rich Man/Poor Man" Basis, and Dimerco Knew of the Document Which Supposedly Led to the Hiring of New Counsel More Than a Year Before New Counsel Were Hired, and Thus There Was No Evidentiary Basis for the Inference Respondent Asked the Jury to Draw.

In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

Yingling v. Hartwig, 925 S.W.2d 952 (Mo. App., W.D. 1996)

Carlyle v. Lai, 783 S.W.2d 925 (Mo. App., W.D. 1990)

Green v. Ralston Purina Co., 376 S.W.2d 119 (Mo. 1964)

V.

The Trial Court Erred in Submitting Instruction Nos. 7 and 12 (the Verdict Directors) Because They Constituted "Roving Commissions" In That The Instructions Failed to Require the Jury to Find Facts That Would, If Believed, Constitute a Breach of Fiduciary Duty in That They Allowed the Jury to Find Defendants Liable if They Concluded That Chan Helped Dimerco "Take Over" Scanwell's Business Operations, "Including" Obtaining The Office Lease And Disclosing Confidential Information, Thus Inviting The Jury To Find Liability For Other Actions Not Specified In The Verdict Directors.

Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458 (Mo. banc 1998)

Centerre Bank of Kansas City, Nat'l Assn. v. Angle, 976 S.W.2d 608 (Mo. App., W.D. 1998)

St. Louis County v. State Highway Commission, 409 S.W.2d 149 (Mo. 1966)

VI.

The Trial Court Erred in Submitting Instruction No. 9 Defining "Fiduciary Duty" Because the Instruction Misstated Missouri Law By Stating That A Fiduciary Duty Between An Employer And Employee Arises When The Employer Merely "Reposes Trust And Confidence In Another" In That No Such Fiduciary Duty Exists Unless the Person Alleged to Have Breached the Duty Gains Superiority and Influence Over the Other.

Shervin v. Huntleigh Sec. Corp., 85 S.W.3d 737 (Mo. App., 2002)

Horwitz v. Horwitz, 16 S.W.3d 599 (Mo. App., E.D. 2000)

Pony Computer, Inc. v. Equus Computer Sys. of Missouri, Inc., 162 F.3d 991 (8th Cir. 1998)

VII.

The Trial Court Erred in Denying Dimerco's Motion for Judgment Notwithstanding The Verdict Because Scanwell Failed to Make a Submissible Case of Conspiracy Against Dimerco in That It Failed to Present Any Evidence of a Conspiracy Concerning the Lease, Inasmuch as It Was Undisputed That Anthony Tien, Who Signed the Lease on Behalf of Dimerco, Was Unaware That He Was Leasing the Same Space Previously Occupied by Scanwell, and It Was Undisputed That Kurt Brydenthal, Who Authorized Ms. Chan to Obtain a Lease for Scanwell, Did Not Do So Until After Learning That Scanwell Had Failed to Renew Its Lease.

Nat'l Rejectors, Inc. v. Trieman, 409 S.W.3d 1 (Mo. banc 1966)

ARGUMENT

STANDARD OF REVIEW

The Court reviews a denial of a motion for directed verdict, for judgment notwithstanding the verdict, or for new trial to determine whether the plaintiff made a submissible case. In making that determination, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to plaintiff. The Court presumes that the plaintiff's evidence is true and disregards any of defendant's evidence that does not support the verdict. However, the Court will not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative or forced inferences. The evidence and inferences must establish every element and not leave any issue to speculation. A party is bound by the uncontradicted testimony of his own witnesses, including that elicited on cross-examination. *See, e.g., Brandt v. Pelican,* 856 S.W.2d 658, 664 (Mo. banc 1993); *Simpson v. Johnson's Amoco Food Shop, Inc.*, 36 S.W.3d 775, 776 (Mo. App., E.D. 2001); *Messina v. Prather*, 42 S.W.3d 753, 761 (Mo. App., W.D. 2001); *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 584 (Mo. App., S.D. 1999). This standard applies to Points I, II and VI.

Remittitur is appropriate "if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." § 537.068 RSMo 2000. An appellate court reviews the amount of a verdict to determine whether it is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and trial court abused their discretion. *Gomez v. Construction*

Design, Inc., 126 S.W.3d 366, 375 (Mo. banc 2004); *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App., E.D. 1995). Ultimately, the test is what amount fairly and reasonably compensates the plaintiff for the injuries sustained. *Willman v. Wall*, 13 S.W.3d 694, 699 (Mo. App., W.D. 2000); § 537.068 RSMo 2000. This standard applies to Point III.

The Court reviews rulings on objections to closing argument for an abuse of discretion. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 870 (Mo. banc 1993). This standard of review applies to Point IV.

The issue of whether the jury was properly instructed is a question of law and is to be determined on the record with little deference given to the trial court's decision. The Court reviews the evidence and inferences in a light most favorable to submission of the instruction. *Oldaker v. Peters*, 817 S.W.2d 245, 251-52 (Mo. banc 1991); *Rudin v. Parkway School Dist.*, 30 S.W.3d 838, 841 (Mo. App., E.D. 2000). The Court reviews a non-M.A.I. instruction to determine whether the jury could understand the instruction and whether the instruction follows the applicable substantive law. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 462 (Mo. banc 1998). "The verdict is reversed if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error." *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003). This standard applies to Point V.

I.

The Trial Court Erred In Denying Appellants' Motion For Judgment Notwithstanding The Verdict Because Respondent Failed To Make A Submissible Case In That It Failed To Present Any Evidence From Which The Jury Could Reasonably Find That Chan Owed A Fiduciary Duty Concerning The Lease Or That She Breached Any Such Duty, Inasmuch As An At-Will Employee's Mere Preparation To Leave Her Employment, Including Entering Into A Lease Of Office Space, Is Insufficient To Show A Breach Of Fiduciary Duty.

The Circuit Court erred in denying Stevie Chan's motion for judgment notwithstanding the verdict because Chan owed no fiduciary duties to Scanwell and breached no duty of loyalty to her former employer while she was working there. Given that Chan committed no wrongful acts, it follows that the court also erred in denying Dimerco's motion for judgment notwithstanding the verdict where the judgment against it was premised on a theory that it conspired with Chan to breach those duties.

Chan was Scanwell's branch manager in St. Louis. She was not an officer or director of the company, but what would these days be described in business-school parlance as a middle manager. While she had day-to-day responsibility for the St. Louis operations (and was rated by her superiors based upon the office's profit and loss statement), Chan no authority to hire, fire, or sign contracts on her own. She could only recommend matters such as where to locate the office and on what terms, or who to hire, what to pay them or whether they should be given raises. T. 446, 449-450. M.B. Hassan, her superior, reserved all decision making power for himself. T. 449, 450, 1100. That he agreed with all of her recommendations did not give her any additional authority — it just showed that she was a good manager who made sound recommendations (something no one, not even plaintiff, disputed).

Scanwell did not repose any *special* trust or confidence in Chan beyond that any company would have in a competent middle manager. She had no authority to commit Scanwell to any agreements that affected the company's St. Louis office without permission from Hassan.

In those circumstances, there was simply no basis for a submission of a breach of any fiduciary duty because she owed none. Indeed, the verdict directing instruction eschewed any submission that asked the jury to find directly that she breached a fiduciary duty. Rather, the court submitted the claim against Chan on the basis of an alleged breach of the duty of loyalty. *See* Instruction No. 7, L.F. 49. However, there was no evidence to support a verdict on this theory either. At best an employee owes a duty of loyalty to her employer only so long as she is working for the company. What Chan did here — which were mere preparations to leave — does not fall within any notion of a breach of the duty of loyalty under Missouri law. An at-will employee may tell fellow employees that she is leaving, she may tell her customers that she is leaving, she may secure office space for the venture, and she need not tell her current employer of her plans to leave. All of these acts which formed the basis of Scanwell's claim have been found by Missouri courts for at least the last forty years to be perfectly proper. *See, e.g., National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 26-28, 37 (Mo. banc 1966); *Dwyer, Costello and Knox, P.C. v. Diak,* 846 S.W.2d 742, 746-748 (Mo. App., E.D. 1993).

Much of Scanwell's application for transfer is devoted to the proposition that at-will employees, or at least branch managers, owe a fiduciary duty to their employer identical to that of trustees, officers and directors of corporations, or attorneys. In support of that notion, Scanwell cited a number of decisions from other states. *See* Application for Transfer at 4-5.

The law in this state has been clear since 1966 when this Court decided the seminal case of *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1 (Mo. banc 1966). It is not clear whether Scanwell seeks to have the Court reconsider *Trieman* or to just ignore it. Certainly, its Application for Transfer, by selectively quoting from *Trieman*, misses the larger point — everything Chan did fell within the scope of what the Court held was proper conduct by an at-will employee, who did not have a covenant not to compete, and who was neither an officer nor director of the corporation.

None of the employees in *Trieman* were corporate officers or directors. *See id*. at 38. One employee *was* a branch manager; one was a sales manager, but (like Chan) "had little discretionary authority"; another was a modelmaker, another a foreman, and yet another was a purchasing agent. *See id*. None (like Chan, and indeed, like all of Scanwell's St. Louis employees) had a written employment agreement or had signed a covenant not to compete.

In these circumstances, *Trieman* held that branch managers, sales managers, purchasing agents and other lower-level employees could take steps to enter into competition with their employer while still working there. In *Trieman*, the employees obtained a place for their new business, spoke to other employees who were dissatisfied at work about joining them in their new venture, obtained equipment and supplies for the new company, and subsequently used the knowledge and skill they acquired at their former place of work to compete with their former employer. *See id*. at 36-37. *Trieman* did not describe these employees as fiduciaries, but instead analyzed their conduct in the context of a duty of loyalty and the alleged misuse of trade secrets.

Most of the cases from other jurisdictions cited by Scanwell in its Application for Transfer involve former officers and directors who are considered fiduciaries with respect to the corporation as a matter of law. *See, e.g. Bancroft-Whitney Corp. v. Glen*, 411 P.2d 921 (Cal. 1966)(defendant was former president and director); *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 379 N.E.2d 1228 (Ill. App., 1st Dist., 1978)(defendants were former president and vice presidents); *Maryland Metals, Inc., v. Mezner*, 382 A.2d 564 (Md. 1978)(defendant was former executive vice president); *Platinum Management, Inc. v. Dahms*, 666 A.2d 1028 (N.J. Super. Ct. Law Div. 1995)(defendant was former officer); and *Duane Jones Co., Inc. v. Burke*, 117 N.E.2d 237 (N.Y. 1954)(defendants were former officers). To the extent that these cases are based on the proposition that corporate officers owe a fiduciary duty to the corporation, they are consistent with Missouri law. *See, e.g. Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373 (Mo. App., E.D. 2000).

Some of the cases Scanwell cited considered whether the employee's conduct was a violation of a duty of loyalty. *See Fish v. Adams*, 401 So.2d 843 (Fla. App. 1981); *Porth v. Iowa Department of Job Service*, 372 N.W.2d 269 (Iowa 1985). One case involved the alleged breach of fiduciary duties by an a branch manager under Oregon law, which the court specifically recognized differed from Missouri law as announced in *Trieman*. *See American Republic Ins. Co. v. Union Fidelity Life Ins. Co.*, 470 F.2d 820, 825 (9th Cir. 1972).

The final case, *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473 (Tex. Civ. App. 1975), was tried on a theory of tortious interference. The court said that a manager could have a fiduciary duty. *See id*. at 477. The particular charge against the defendant was that he asked the landlord to terminate the plaintiff's lease and to lease the same premises to his new competing company while he was still employed by the plaintiff. *See id*. While Scanwell contended that was what happened here, that claim is not borne out by the evidence as will be discussed in more detail below.

There is a common thread among the non-Missouri cases that is shared with *Trieman*. The courts were struggling to reconcile two competing principles: The duty of loyalty (whether or not expanded to a full-blown fiduciary duty) encompassing the notion that an employee should not act directly contrary to his employer's interests while still working for it, versus the employee's right to work where she wants, and to continue to use the skills and contacts she has developed in her career. *See National Rejectors, Inc. v. Trieman*, 409 S.W.2d at 41.

For an employee who is not an officer or director, there is no basis for imposing on them a fiduciary duty comparable to that found in relationships such as trustee-beneficiary or attorney-client absent some unusual circumstance where the employer has reposed some special trust and confidence in the employee beyond that normally found. A fiduciary duty is one of the highest known in the law. Fiduciaries cannot act to benefit their personal interests, they must inform the other party of anything of which they are aware that would be important to the relationship, and indeed some duties persist beyond the formal termination of the relationship.

It is obvious that the principles declared in *Trieman* as applicable to employees are inconsistent with the concept of a fiduciary duty as traditionally defined in the law of trusts. An employee may make plans to leave her employment for a competitor, she may inform existing customers before she leaves that she is leaving, and she need not tell her employer of her plans. Even the Restatement of Agency § 393, which describes the employer-employee relationship as a species of agency, concedes the employee's rights in this respect. A true fiduciary cannot do those things.

So, what provides the appropriate standard? We suggest that it is the duty of loyalty. Whatever the nuances of the differing positions taken by the various jurisdictions as to the duties owed by an employee to her employer, some fundamental principles emerge — and, not surprisingly, they are the ones approved by this Court forty years ago.

The duty of loyalty means that an employee cannot actively compete with her employer while still employed. It does not prohibit an employee from making preparations or plans to leave, even for a competing business. She may agree with other employees to compete against their then employer upon termination of employment. *National Rejectors, Inc. v. Trieman*, 409 S.W.2d at 26. Her plans and preparations may be kept secret from her current employer because, "[i]f such right is to be in any way meaningful for an employee not under contract for a definite term, it must be exercisable without the necessity of revealing the plans to the employer." *Id*. at 26-27. She may not take confidential information with her, but she may use the knowledge and skills she either brought to the relationship with her or obtained while there in her new work. *See id*. at 27, 41. She may inform customers while still employed of her plans to leave — although she may not solicit their business until after she leaves (assuming, of course she has not signed a valid covenant not to compete).

With these general principles in mind, we now turn to Scanwell's specific claims against Chan and the evidence to support them.

Chan immediately commenced employment with Dimerco, a competitor of Scanwell. Chan had no employment agreement or covenant not to compete with Scanwell. Therefore, there was no violation of any duty from the simple fact of joining a competitor.

Chan had Scanwell's telephone number switched to Dimerco so that calls for Scanwell would be answered by Dimerco. Scanwell requested that its main telephone and fax number be retained so that when customers called the telephone would be answered by Scanwell's Chicago office. Chan complied with that request. Due to errors by Birch Telecom, the telephone company — not some nefarious plot by Chan — the calls at first did not go through to Chicago. When Chan was advised of this problem, she promptly acted to correct it. T. 789-794.

Chan arranged with the landlord to have the office furniture sold to the landlord for use by Dimerco. When Scanwell decided to close its St. Louis office, rather than lease other space in the same or a different building, it had no use for the St. Louis office equipment. James West, the landlord, testified that his tenants frequently abandoned their office furniture when they left. T. 1506. He also frequently bought the furniture, which he stored in a warehouse, and sold it or allowed new tenants to use it. T. 1506. Used office furniture has a low market value. T. 1506.

Here, Chan asked and received permission from Scanwell to sell the furniture to the landlord. T. 1233-1236. Scanwell received proceeds at price to which it agreed. T. 1508. The landlord then re-sold it to Dimerco — a very common transaction in Mr. West's business. There was no evidence that the furniture could have been sold for more than West paid for it, or that Scanwell had any use for the furniture after it decided to close the St. Louis office.

Chan acquired Scanwell's leases for office equipment for Dimerco's use. As with the furniture, Scanwell had no use for the St. Louis office equipment in Chicago. If it made no alternate arrangement for the leases, Scanwell was subject to having to pay the lessor up to $10,000 for the remaining term of the lease. T. 784-787. Once again, Chan sought and received Scanwell's permission for Dimerco to assume the leases. T. 784-787. Scanwell saved $10,000 and Chan even paid the transfer fee for the leases out her own pocket rather than continue a dispute with Scanwell about whether it was contractually obligated to make that payment. T. 786.

Chan convinced all of Scanwell's St. Louis employees to leave the company and to go to work for Dimerco. First, none of the Scanwell St. Louis employees had employment agreements or covenants not to compete. T. 1262. Asking them to join her at Dimerco violated no duties owed to Scanwell. *See Diak*, 846 S.W.2d at 747-748; *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 351 (Mo. App., E.D. 2000). *See also*

Metal Lubricants Co. v. Engineered Lubricants Co., 411 F.2d 426, 429 (8th Cir. 1969) (inducing all employees of regional office to join competitor is not a violation of the duty of loyalty where employees are not bound by covenants not to compete). If Scanwell were concerned about employees leaving before a certain time, it should have gotten its employees under a written contract for a definite term; if it were concerned about competition after they left, it should have had them sign covenants not to compete. *See Diak*, 846 S.W.2d at 748; *McHugh*, 28 S.W.3d at 351.

Second, Scanwell conceded that there was nothing wrong in Chan telling her boyfriend, Al Chin, or her sister, Sandy Chan (both of whom worked at Scanwell St. Louis) of her plans to leave before she even submitted her resignation. T. 1264-1265. It can hardly be a breach of duty for an employee to confide her employment plans to her family and significant others.

Third, timing is important. Even the cases from other jurisdictions that Scanwell cited in its Application for Transfer only prohibit soliciting other employees to join the new venture before the defendant leaves employment. *See, e.g., Porth*, 372 N.W.2d at 273-274 (collecting cases). Here, the *only* evidence was that Chan did not ask the other employees to join her at Dimerco until after Scanwell sent a layoff letter to each to the employees on March 21, 2001, and she was formally hired by Dimerco after her meeting with Roy Chen on March 24. T. 781-782. Solicitation of at-will employees after one leaves work is not a violation of any duty, whether characterized as a fiduciary duty or a duty of loyalty. Indeed, in Missouri even a written agreement not to solicit employees at one's former place of work after going to another employer is unenforceable. *See McHugh*, 28 S.W.3d at 351.

Chan solicited Scanwell customers to do business with Dimerco. Again, timing is important here. There was no evidence that Chan solicited any customers for Dimerco while employed by Scanwell. The evidence focused on trips to two customers, Promotional Resources Group in Kansas and C/OK-1 in Oklahoma, that Chan made in February 2001 after she had decided to leave Scanwell but before she submitted her resignation. Chan testified that she told the customers only that she was leaving Scanwell and that others at Scanwell would see to their needs. T, 611, 613-614. Rae Kathrens, from Promotional Resources Group, confirmed that Chan told her only that she was leaving Scanwell. T. 1571-1572. Chan contacted Kathrens about Dimerco only after she had left Scanwell's employ. T. 1575. It was proper for Chan to inform her customers that she was leaving Scanwell before her employment there ceased. *See, e.g. Diak*, 846 S.W.2d at 747. (Indeed, *Dwyer* holds that a "defendant is not liable for damages simply because he solicited the business of some of plaintiff's clients before the date on which he made his resignation effective." *See id* at 748.)

Chan gave Dimerco employees a "tour" of the Scanwell office in September 2000. The so-called "tour" consisted of taking Anthony Tien and Kurt Brydenthal in the front door for about five minutes. T. 327-328. She did not show them any "confidential" information or allow them access to Scanwell's files. Scanwell did not claim any damage from the viewing of the office.

Chan made a "secret" agreement to amend the termination date of the office lease, thus advancing the date for exercise of the option to renew from January 31, 2001 to December 1, 2000, and later obtained a lease for Dimerco of the same premises Scanwell occupied. This was one of two breaches of the duty of loyalty that were specifically mentioned in the jury instructions. Scanwell did not repose any special trust or confidence in Chan with respect to the office lease. She had no discretionary authority to obtain a lease — she had to send it to Chicago for approval, which she did in 1998. T. 449-450. As for Scanwell's insinuation that Chan and the landlord cobbled together the amendment changing the termination date from May 31 to March 31 sometime during 2001 in order to dump Scanwell without a chance to renew the lease, there was no evidence at all to support that claim. Both Chan and West testified that the request to change the lease came from West, and that it was made shortly after the original lease was first signed in May 1998. T. 336, 1493, 1540-1542. Chan testified that she sent the amended lease to Chicago. T. 687. Hassan said that he didn't approve the amendment, T. 1121, but stopped short of saying that he didn't receive it in 1998.

Scanwell's principal complaint was that Chan failed to remind the Chicago office of the renewal date. Scanwell has never cited, and our research has failed to find, any case holding that an employee owes a "duty to remind" her employer of its legal rights and obligations. Chan was not a lawyer. She didn't pay much attention to any of the provisions of the lease except the rental payment and the amount of space. T. 1491. One of the reasons the lease was sent to Chicago for approval was to allow Scanwell's attorney to review it.

Hassan or others at the Chicago office were just as capable of reading the lease's renewal provisions and setting up some sort of reminder of the date for the exercise of the option to renew as Chan. She wasn't authorized to enter the original lease on her own. Even though Scanwell Chicago understood it had to exercise the renewal option, at the latest, by January 31, 2001, no one at Scanwell ever directed Chan to exercise the renewal option by that date. No one at Scanwell Chicago knew in January 2001 that Chan was leaving — she didn't decide until January 29. Yet, no one gave her the go-ahead to sign a new lease. Chan read this as a sign that Scanwell was indeed planning to close the St. Louis office as had been rumored for months.

The closest case to the circumstances here that Scanwell has found is *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473 (Tex. Civ. App. 1975). In *Criswell,* however, the employee asked the landlord to terminate his employer's lease so that he could lease the property himself. *See id.* at 475-477. Here, Chan made no such request. The claim wasn't that she affirmatively took action to have the landlord terminate the lease, but that she failed to remind her superiors in Chicago of what they should have already known — that they had to exercise the right of renewal or authorize her to do so for Scanwell. They didn't do that, even for the January 31 renewal date. Now they want to pin their own failures on Chan.

Scanwell makes much of the fact that Chan got authorization from Dimerco and signed the lease for the same space in February 2001 while she was still working for Scanwell. This claim would mean nothing if the space had been across the hall or at some other building West or another landlord owned. Under *Trieman,* it is clearly permissible for an employee as part of her preparation to leave and compete with her present employer to rent office space. *See Trieman*, 409 S.W.2d at 26; *Diak*, 846 S.W.2d at 747.

Once Scanwell no longer had the right to renew the lease, the space was available to anyone, including Dimerco. Scanwell had no legal right to the office and would have had to vacate the space had the landlord rented it to anyone else. Thus, the fact that it was the same office that Scanwell formerly occupied became legally meaningless once the option to renew lapsed.

Chan shared "confidential" information with Dimerco prior to leaving Scanwell. This claim revolves around the customer profile or "SOP" that Chan prepared for InterGlobal, Inc. (Exhibit 5) that Chan gave to Dimerco before she left Scanwell. At the outset, it should be noted that the incident concerning the InterGlobal SOP was the basis for Scanwell's claim of unfair competition in Count III of its Petition that was submitted to the jury under Instruction Nos. 15-21. L.F. 57-63. The jury rejected that claim, thus finding no wrongdoing in Chan's conduct in this respect. L.F. 111.

InterGlobal was one of Chan's customers at Fritz, a freight forwarder where she worked before joining Scanwell. T. 674-675. Chan brought InterGlobal to Scanwell with her and it became the company's largest St. Louis customer. T. 674-675.

Even before she was hired by Scanwell, Chan developed the form for the SOPs. T. 820. These documents were a compilation of information about each customer, such as the customer's name, address and telephone number; her contact at the customer; the customer's special handling requirements; and the rates charged or quoted to the customer. Most of the information was publicly available, or could be obtained from the telephone or other directories. InterGlobal shipped about 90% or more of its goods by ocean. Ocean rates are publicly available because the tariffs must be filed with the Federal Maritime Commission. T. 347-349, 360. Only air rates are not publicly available. T. 404.

Scanwell claimed that the InterGlobal SOP was confidential and thus fell within one of the recognized claims that can be made against even an at-will employee, misuse of confidential or trade secret information. *See, e.g.*, *Trieman*, 409 S.W.2d at 44. But Scanwell bore the burden of proof showing that the SOP was confidential. This requires more than just saying that it is confidential or that one considers it so, but also that it is treated by the company as confidential. *See, e.g., Metal Lubricants Co. v. Engineered Lubricants Co.,* 411 F.2d 426, 428 (8th Cir. 1969).

Scanwell failed to meet that burden. Scanwell's subjective belief that the SOP was confidential is not sufficient. One of the stock questions Scanwell asked the witnesses was whether they would give their competitor the information that was in the SOP if they came in and asked for it. Perhaps that has some rhetorical appeal to a jury, but it was meaningless here. All of the witnesses testified that they wouldn't give their competitors even public information readily available — such as a customer's telephone number. *See*, *e.g.*, T. 307-308.

More importantly, the evidence was that Scanwell did not treat this information as confidential. At InterGlobal's request, Chan gave it a copy of its own SOP. William Shiang, InterGlobal's manager of international operations, testified that he in turn gave copies of the SOP to Scanwell's competitors (not Dimerco) as a way of playing one freight forwarder off another so that he could get a better price for his company. The first requirement of confidential information is that it be secret. This wasn't secret, and it wasn't confidential.

In summary, Scanwell simply failed to make a submissible case for any breach of fiduciary duty or duty of loyalty against Chan. She never neglected her duties to Scanwell from the time she first met Dimerco people in 2000 up to when she left in 2001. The financial results show that Scanwell turned a $109,000 profit for the year 2000, and that January 2001 (her last full month) was the best month that Scanwell ever had in St. Louis. T. 470, 841; Pl. Ex. 22. Even Hassan conceded that Chan put forward her best during her active time as a Scanwell employee. T. 1245. Chan did nothing improper. Yes, she made plans to leave, but she was careful to tell her customers only that she was leaving — she didn't tell them where or attempt to secure their business for Dimerco until after her resignation was effective.

Chan proposed taking the St. Louis employees with her, but (except for her sister and boyfriend) didn't make any offer of employment to them until after Scanwell terminated them, and she herself had been formally hired by Dimerco. T. 781-782. And even if she had asked them to join her at Dimerco, all of the St. Louis employees were at-will and had no covenants not to compete. T. 1262. There was no legal impediment to asking them to work for Dimerco.

Chan didn't breach any duty as to the lease. There is no fiduciary "duty to remind" an employer of its legal rights and obligations, especially by a non-lawyer whose duties did not include giving legal advice. The Chicago office kept her on a short leash when it came to committing the company to lease obligations. She had no discretionary authority to enter into the lease in the first place, and no duty to remind her superiors in Chicago of the terms of a lease that they had in their possession. She did not, as the defendant did in *Criswell*, ask the landlord to terminate the lease.

As for providing the InterGlobal SOP to Dimerco, that was not a violation of any duty (as the jury determined with respect to the unfair competition claim). It was given to Dimerco as an example of a form Chan herself had developed while working at Fritz and that she had brought to Scanwell. T. 820. It was not protected under any intellectual property right. Indeed, it was a compilation of information about a particular customer that anyone could largely duplicate from public sources, and that Chan herself could duplicate from the information she acquired from being in the business for many years. T. 654, 772. There is no evidence that the information was misused in any way. Dimerco didn't even realize that the rate information in the SOP came from Scanwell. Finally, the information was hardly "secret." InterGlobal itself had a copy that it freely shared with Scanwell's competitors as a method of getting better shipping rates. T. 1618-1620. This was the *only* Scanwell customer profile or SOP that Dimerco received. Chan testified — and no one from Scanwell even attempted to dispute her — that she made sure that all customer SOPs, along with *all* of Scanwell's files and computers were sent to the company's Chicago office.

In short, Scanwell failed to make a submissible case of the existence of any fiduciary duty or the breach of a duty of loyalty. The judgment against Chan should be reversed.

Dimerco was held liable on the premise that it conspired with Chan to breach the duties she owed to Scanwell. Conspiracy is not a free-standing tort. It requires proof of a wrongful act done in furtherance of the conspiracy. *Rosen v. Alside*, 248 S.W.2d 638, 643 (Mo. 1952). It follows, then, that plaintiff's case against Chan having failed, Dimerco was entitled to a judgment notwithstanding the verdict as well, and a reversal from this Court.

II.

The Trial Court Erred in Denying Appellants' Motion for Judgment Notwithstanding the Verdict on the Issue of Damages Because Respondent Failed to Present Any Evidence of Damages Arising From the Alleged Misappropriation of Its Office Lease, Inasmuch as the Only Damage Evidence Respondent Offered Was for the "Diminution in Value" of the St. Louis Office Allegedly Resulting From an Aggregate of Purported Offenses, Rather Than Increased Rent or Other Losses Caused Specifically by the Alleged Misappropriation of the St. Louis Office Lease.

Damages are an essential element of a claim for breach of fiduciary duty. *See, e.g.*, *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. banc 1997). When the plaintiff fails to present substantial evidence of damages, a directed verdict is proper. *See, e.g.*, *Boyer v. Sinclair & Rush, Inc.*, 67 S.W.3d 627, 635 (Mo. App., E.D. 2002) (reversing judgment because claimant did not proffer sufficient evidence of damages and, therefore, the trial court should have directed a verdict); *White v. Pruiett*, 39 S.W.3d 857, 864 (Mo. App., W.D. 2001) (affirming directed verdict where plaintiff failed to present substantial evidence of damages).

Scanwell submitted only two specific alleged breaches of the duty of loyalty for the jury to consider — "securing Plaintiff's business lease for Defendant Dimerco [and] . . . disclosing confidential information of Plaintiff to Dimerco." Instruction Nos. 7, 12; L.F. 70, 82. Even assuming that it was improper for Dimerco to lease space on which Scanwell had let its option to renew lapse, plaintiff did not base its damage calculation on the loss of the lease. There was no claim of having to pay increased rent — indeed, Scanwell made no effort at all to find alternate space although there was a suitable office available in the same building. T. 1501, 1504, 1539. Likewise, Scanwell did not try to assign any damages to the disclosure of the InterGlobal SOP to Dimerco. Indeed, it could hardly do so because InterGlobal itself made the identical document available to Scanwell's competitors. T. 1618-1620.

Rather, Scanwell's entire theory of damages was premised on the notion that it should be compensated for the so-called "takeover" of its St. Louis office. Plaintiff made no effort to breakdown these alleged damages into any component parts, such as damages attributable to its loss of the office lease, damages attributable to the alleged sharing of confidential information about InterGlobal, or lost profits due to the loss of other customers.

Scanwell presented its damages as a calculation of the alleged diminution in value of Scanwell's St. Louis office (not a lost profits calculation), but no evidence was presented that any diminution in value resulted specifically from the loss of Scanwell's lease. Plaintiff's accounting expert admitted that he had made no effort to allocate or quantify the specific damages allegedly resulting from the loss of the lease, as opposed to other activities that Scanwell alleged (such as misappropriation of trade secrets, an allegation the jury rejected). Stating:

> Q. In fact, you didn't allocate your damages, your $479,000 of damages among the various things that Scanwell is complaining about in this case, did you?
>
> A. No, I did not.
>
> * * *
>
> Q. Did you put any damages or figure the damages on the lease, the value of the property that Ms. Chan is accused of manipulating so that it ended up in the hands of Dimerco?
>
> A. Theoretically, the valuation takes that into consideration, takes those things into account. But that specific, that specifically, no, we were not asked to allocate damages as to any of the allegations.
>
> Q. So that if folks – the jurors say, We think everything Stevie [Chan] did was okay, we don't like the lease thing, we don't like that Dimerco's in the leased space, you haven't given them any damages associated with the lease space?
>
> A. No, we did not.

T. 1407-09.

In short, Scanwell presented no evidence of any damages — compensable or otherwise — flowing specifically from the specific breaches of duty submitted to the jury. As a result, the jury was invited to select a damage figure from thin air. The jury, lacking any guidance from the evidence, appears to have selected one year's salary for Chan, $54,000, and Chan's salary plus $200,000 for a total of $254,000 against Dimerco.

These figures, however, have no connection with the alleged breaches. Certainly, there was no evidence that Defendants' conduct as submitted in Instruction Nos. 7 and 12 proximately caused damages in those amounts.

Because of the complete absence of evidence of actual damages resulting from the alleged misappropriation of the lease, the trial court erred in denying Defendants' motions for directed verdict, JNOV, and new trial on the issue of damages.

III.

The Trial Court Erred in Denying Dimerco's Motion for Remittitur or, Motion for New Trial on the Issue of Damages Because the $254,000.00 Verdict Against Dimerco Was Inconsistent With the $54,000.00 Verdict Against Ms. Chan and Was Not Reasonably Calculated to Fairly Compensate Respondent But, Rather, Was Designed to Punish Dimerco in That Even Though Dimerco Was Held Liable as a Co-Conspirator, and Even Though the Damages Resulting From a Conspiracy Cannot Exceed the Damages Resulting From the Underlying Alleged Tort, the Verdict Against Dimerco Exceeded By $200,000.00 the Amount of Damages the Jury Arguably Concluded Respondent Suffered as a Result of the Underlying Alleged Tort.

The jury returned a verdict against Chan for $54,000.00 (the amount of her yearly salary) for breach of fiduciary duty and against Dimerco for $254,000.00 (Chan's salary plus $200,000.00) for conspiracy to breach fiduciary duty. But conspiracy is not a free-standing tort – it is a means of imposing vicarious liability on a party for the actions of the co-conspirator. All alleged conspirators are jointly and severally liable for the damages caused by the underlying tort. That means here that Dimerco could be jointly and severally liable *at most* for $54,000, the damages the jury arguably found were caused by a breach of fiduciary duty. There is no basis for an extra "kicker" by which the jury adds damages for a co-conspirator. Thus, the verdict against Dimerco was inconsistent, inexplicable, and not reasonably calculated to fairly compensate Scanwell. Dimerco's "joint and several" liability can be no greater than Chan's liability. At a minimum, the Court should order the judgment against Dimerco remitted to $54,000.00, or order a new trial.

In civil cases, the gist of a conspiracy action "is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage to plaintiff." *Gettings v. Farr*, 41 S.W.3d 539, 541 (Mo. App., E.D. 2001). This fundamental principal has two corollaries here. First, if the underlying acts are not wrongful, there can be no liability for civil conspiracy. *Rice v. Hodapp*, 919 S.W.3d 240, 245 (Mo. banc 1975). Thus, if Plaintiff failed to make a submissible case against Chan (*see* Point I), then the conspiracy count, the only claim against Dimerco that survived the jury's verdict, should be dismissed as well. (The jury rejected Scanwell's claims of unfair competition against both Chan and Dimerco.)

The second corollary is that "[s]trictly speaking, the fact of conspiracy is not actionable." *See Mills v. Murray*, 472 S.W.2d 6, 12 (Mo. App. 1971). "The fact of a conspiracy merely bears upon the liability of the various defendants as joint tort-feasors." *Roysten v. Baker*, 365 S.W.2d 496, 500 (Mo. 1963). Thus, the conspiracy count here was merely a method by which Dimerco could be held jointly and severally liable for Chan's alleged breaches of fiduciary duty.

This is evident from Instruction No. 12 (the conspiracy verdict director) which posited only Chan's affirmative acts as the alleged wrongful conduct. *See* L.F. 54. The jury was not asked to find, and could not have found under Instruction No. 12, that Dimerco engaged in any conduct separate from Chan's that could have justified any additional damages against Dimerco.

Rather, consistent with the law of civil conspiracy, Dimerco was at worst jointly and severally liable for the damages caused by Chan's alleged breach of duties — $54,000 according to the jury's findings against her.

IV.

The Trial Court Erred in Denying Appellants' Motion for Mistrial and Motion for New Trial Because Appellants Were Unfairly Prejudiced by the Misconduct of Respondents' Counsel When He Invited the Jury to Infer From Appellants' Choice of Counsel That Appellants "Knew They Had Done Something Wrong," in That a Jury May Not Draw Any Adverse Inference From the Defendants' Choice of Lawyers, the Remark Was an Appeal to the Jury's Prejudices on a "Rich Man/Poor Man" Basis, and Dimerco Knew of the Document Which Supposedly Led to the Hiring of New Counsel More Than a Year Before New Counsel Were Hired, and Thus There Was No Evidentiary Basis for the Inference Respondent Asked the Jury to Draw.

While counsel are largely given a free hand in closing argument, here Scanwell stepped over one of the few well-defined lines of improper jury argument. He tried to convince the jury that it should find defendants liable because they hired "two of the largest law firms in the country" to defend them. Plaintiff's argument doesn't even get points for subtlety — it's a meat axe approach: defendants hired "big firms" because they knew they were really in trouble. And it was compounded by counsel's further sarcastic remark to the jury after the court denied defendant's motion for a mistrial that "They didn't like that." T. 1823.

While one could understand that a judge would be dismayed at having to grant a mistrial after two weeks of trial, some things trump considerations of trial management and a waste of judicial resources. Parties — even those represented by large law firms — are entitled to a fair trial where the jury's decisions are based on the merits of the claims, not on shabby appeals asking a jury to draw adverse inferences from the exercise of protected rights.

During the rebuttal portion of his closing argument, Scanwell's counsel said the following:

> Ladies and gentlemen of the jury, when this case started, Dimerco and Stevie Chan were represented by a guy named David Heimos, a sole practitioner like me. This case was going along and then all of a sudden, out of the blue, bang, two of the largest law firms in the country are on this case. When did that happen and why did it happen? You know why it — do you know when it happened? Right when they learned of this business plan, very detailed plan, which by the way wasn't produced to me right away when I requested it. But somebody realized, you know what, we got a problem here. So Mr. Heimos was fired and they hire two law firms that have combined lawyers twelve hundred lawyers.

* * *

> Now, ladies and gentlemen, there's only one of two conclusions. Either I'm really, really, really that good of a lawyer or they did something wrong. And, you know, my wife says I'm a pretty good lawyer, but I'm not that good.

T. 1821-1822.)

Defendants' counsel immediately approached the Court at a sidebar conference and moved for a mistrial, which the court denied without comment. T. 1822-1823. Then, Scanwell's counsel commented to the jury, "They didn't like that." T. 1823.

Whatever inference the jury could properly be asked to draw from the circumstances of the production of the exhibit, there was no justification for suggesting that having "two of the largest law firms in the country . . . on this case" meant *anything* as to defendants' liability. The trial court not only had the authority either to grant a mistrial on the spot or on defendants' post-trial motion for new trial, it had "the *duty* to do so when the effect of [closing] argument was so prejudicial that a party did not receive a fair trial." *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 306 (Mo. App., W.D. 1997) (affirming trial court's grant of new trial because of improper closing argument) (emphasis added). The conduct of Scanwell's counsel in this case easily rises to that level.

Defendants had an absolute right to select the counsel of their choosing. *See*, *e.g.*, *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997) ("The client has the right to choose the attorney or attorneys who will represent it"). It was entirely improper to invite the jury to draw an adverse inference from that selection. For example, in *Carlyle v. Lai*, 783 S.W.2d 925 (Mo. App., W.D. 1990), during cross-examination and in closing the defendant suggested to the jury that it draw an adverse inference from the timing of the plaintiff's first communication with her attorney. The Court of Appeals held that allowing this cross-examination and the defendant's discussion of this point in summation constituted reversible error. The court pointed out that access to the legal system

> is normally not to be discouraged and, exercising one's right to utilize the legal system within established rules and procedures should normally not be used to attempt to discredit a litigant with a jury. . . . *The right to seek the advice of counsel is so fundamental that, absent a justifiable reason and supporting evidence, counsel risk reversal when attempting to discredit a litigant by cross-examining him about the time and circumstances of his having consulted an attorney to discuss and exercise his legal rights.*
>
> The questions asked at the commencement of Ms. Kramer's cross-examination and argued during summation by Mr. Turner regarding when Ms. Kramer hired plaintiffs' attorney injected into the trial an improper issue. The questions were asked to discredit the plaintiffs as avaricious because they sought the services of a lawyer soon after their son's death. . . . *[T]he exercise of a party's rights is not a proper issue for examination and is grounds for reversal*. The question posed to Ms. Kramer and the subsequent argument injected an improper issue into the trial that materially affected the outcome of the action and constituted prejudice.

Carlyle, 783 S.W.2d at 929-930 (emphasis added).

The arguments of Scanwell's counsel in this case were even more egregious than those at issue in *Carlyle*. Not only did Scanwell's counsel invite the jury to draw an adverse inference from the *timing* of defense counsel's engagement, as in *Carlyle*, but he also asked the jury to draw an adverse inference from the *identity* of the specific counsel chosen. He specifically asked the jury to conclude that Defendants hired large law firms because they knew they had done something wrong. This is not a fair inference to draw, as both the innocent and the guilty are equally free to select the counsel of their choice at any time.

Moreover, Scanwell's argument not only undermined the unqualified right of parties to select the counsel of their choosing, it also appealed to the jury's prejudice in a way comparable to the "rich man/poor man" arguments universally condemned when comparing the size and wealth of parties.

The classic statement denouncing such arguments is in *Green v. Ralston Purina Co.*, 376 S.W.2d 119, 127 (Mo. 1964). There, the plaintiff's counsel argued that "[t]his represents a struggle of a little man against one of the biggest corporations in the business. . . . Any corporation that can reach out and bring witnesses from Germany, Jefferson City or anywhere else can [buy] their soul." The Court reversed the judgment, stating:

> An individual and a corporation come before a court as equals in the eyes of the law. A comparison between the size, power or wealth of the litigants is wholly extraneous and should not be made by counsel. A reference to the financial ability of a corporate defendant to "buy the soul" of witnesses appearing in its

> behalf is patently improper. It carries the implication if not an indirect charge of subornation of perjury. This has no place in a trial in a court of justice, in the absence of supporting evidence. *The rich man-poor man argument, in which counsel consciously and deliberately array the size, wealth or power of a corporation on the one hand against the position of an individual on the other*, and an argument that the corporation has the resources to buy the soul of the witnesses appearing in its behalf, *could have no other effect than to prejudice the corporation in the eyes of the jury and deprive it of its right to a fair and impartial trial*. Such statements are "dangerous and harmful indulgences, potent in exciting sympathy or prejudice, and should be discouraged, especially when apparently used for that purpose. . . . This type of jury appeal is not permitted. *It is the duty of the trial judge to stop such an argument at its inception*; to instruct the jury to disregard it, and to reprimand counsel. *A mistrial should be declared where it appears impossible for the jury to deliberate dispassionately on the merits of a cause or defense as a result of the action of counsel in charging the atmosphere with prejudice.*

Id. at 127 (emphasis added) (citations omitted).

It would be bad enough if the jury had merely been invited in this case to compare the relative sizes of the parties and their law firms. Such an argument would invite the jury to assume, as the jury appears to have done in this case, that defendants could well afford to pay judgments against them if they could afford to pay large law firms. But the arguments of Scanwell's counsel went much further, asking the court to infer from the size of defendants' law firms alone that defendants had actually done something wrong, and that they then hired big law firms to get them "off the hook." In other words, the argument implied that Defendants had to hire big firms to help them concoct a defense.

A similar argument was deemed improper in *Yingling v. Hartwig*, 925 S.W.2d 952 (Mo. App., W.D. 1996). In that case the defense counsel argued: "What you have seen is a year-and-a-half event by those two lawyers to develop a lawsuit. This has been a contrived thing since the moment they walked into the office. . . [W]hat happened is this wasn't just an accident; it was an opportunity for them to make some money. . . ." This argument was prejudicial error because:

> Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts. Hence reckless assertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice. . . . Due administration of justice demands that the jury in passing on such grave questions should not be allowed to have injected in a case, either by evidence, remarks of counsel, or even by the conduct of the judge, any extrinsic matter that tends to create bias or prejudice. The evil effect of such matters is not always cured by the ruling of the court withdrawing them from consideration or even by rebuking counsel. The red hot iron of prejudice has been thrust into the case; merely withdrawing it still leaves a festering wound. When there is no evidence to justify it, it is always improper for counsel to indulge in an argument

> to the jury which tends towards the prejudice of one party or to the undue sympathy for the other.

Yingling, 925 S.W.2d at 958 (quoting *Calloway v. Fogel*, 213 S.W.2d 405, 409 (Mo. 1948) (citations omitted)).

V.

The Trial Court Erred in Submitting Instruction Nos. 7 and 12 (the Verdict Directors) Because They Constituted "Roving Commissions" In That The Instructions Failed to Require the Jury to Find Facts That Would, If Believed, Constitute a Breach of Fiduciary Duty in That They Allowed the Jury to Find Defendants Liable if They Concluded That Chan Helped Dimerco "Take Over" Scanwell's Business Operations, "Including" Obtaining The Office Lease And Disclosing Confidential Information, Thus Inviting The Jury To Find Liability For Other Actions Not Specified In The Verdict Directors.

The jury instructions proposed by Scanwell and submitted to the jury contained multiple "roving commissions," misstated Missouri law on the issue of fiduciary duty, and invited the jury to return a verdict in favor of Scanwell on the basis of a variety of alleged activities that were perfectly permissible under Missouri law.

Instruction No. 7 read as follows:

> Your verdict must be for Plaintiff on its claim against Defendant Stevie Chan for breach of fiduciary duties if you believe:
>
> First, Defendant Stevie Chan, the General Manager of Plaintiff, owed a duty of loyalty to Plaintiff;

Second, during her employment with Plaintiff, Defendant Stevie Chan made arrangements to have Defendant Dimerco take over Plaintiff's business operation including securing Plaintiff's business lease for Defendant Dimerco, disclosing confidential information of Plaintiff to Dimerco [sic];

Third, in so acting, Defendant Stevie Chan breached a duty of loyalty owed to Plaintiff; and

Fourth, as a direct result of Defendant Stevie Chan's conduct Plaintiff was harmed.

L.F. at 49.

Instruction No. 12 provided:

Your verdict must be for Plaintiff on its claim against Defendant Dimerco for conspiracy to breach fiduciary duties if you believe:

First, Defendants Dimerco and Stevie Chan entered into an agreement for Dimerco to take over Plaintiff's business operation including securing Plaintiff's business lease for Defendant Dimerco, disclosing confidential information of Plaintiff to Dimerco, and

Second, Defendants Dimerco and Stevie Chan entered into the agreement for the purpose of interfering with Plaintiff's business operations or obtaining Plaintiff's business for the use of Defendant Dimerco, and

Third, Defendants Dimerco and Stevie Chan carried out their agreement, and

Fourth, as a direct result of the Defendants carrying out the agreement Plaintiff was harmed.

This Court has defined a "roving commission" in a jury instruction to mean that the instruction "assumes a disputed fact or submits an abstract legal question that allows the jury 'to roam freely through the evidence and choose any facts which suited its fancy or its perception of logic' to impose liability." *Seitz v. Lemay Bank and Trust Co*., 959 S.W.2d 458, 463 (Mo. banc 1998) (quoting *Davis v. Jefferson Sav. & Loan Ass'n*, 820 S.W.2d 549, 556 (Mo. App., E.D. 1991)). An instruction that fails to specify the acts or omissions of the party, if any, that the jury must find to impose liability, is a roving commission. *Centerre Bank of Kansas City, Nat'l Ass'n v. Angle*, 976 S.W.2d 608, 617 (Mo. App., W.D. 1998).

Paragraph First of Instruction No. 7 asked the jury whether Chan owed a duty of loyalty to Scanwell, but it failed to give the jury any guidance on how to make this determination. It failed to instruct the jury as to what facts in evidence, if any, would give rise to a duty of loyalty. In effect, Paragraph First of the instruction improperly asked the jury to make a determination as to the law, rather than as to the facts.

The jury was never asked to find that a fiduciary duty existed. The words "fiduciary duty" only appear in the introductory clause of the instructions as descriptive of the type of claim. Instruction Nos. 7 and 12 asked the jury to find that Chan owed a duty of loyalty, but it didn't give any facts to find that would lead it to that conclusion. An instruction that does not advise the jury what facts must be found to reach the conclusion that such a duty exists is defective. *Centerre Bank of Kansas City v. Angle*, 976 S.W.2d at 617. Finally, the jury instructions beg the question of whether a fiduciary duty or duty of loyalty existed. As noted above, the jury was never asked to find any facts that would have demonstrated a fiduciary relationship or duty of loyalty — that claim (although disputed) was just assumed.

The next deficiency in the instructions was their phrasing in Paragraph Second that the jury should find against defendants if it concluded that "Chan made arrangements to have Defendant Dimerco *take over* Plaintiff's business operation *including* securing Plaintiff's business lease for Defendant Dimerco, [and] disclosing confidential information of Plaintiff to Dimerco." Instruction Nos. 7 and 12, L.F. 49, 54 (emphasis added). The point here is virtually self-evident. The jury was free to find some facts *other than* those related to the lease or the disclosure of confidential information that it could conclude — without further guidance —amounted to "taking over" Scanwell's business.

This is nothing less than the very definition of a roving commission: An instruction that "submits an abstract legal question that allows the jury to 'roam freely through the evidence and choose any facts which suited its fancy or its perception of logic' to impose liability." *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d at 463. The "abstract legal question" here was whether Chan "made arrangements . . . to take over" Scanwell's business.

In the Court of Appeals, Scanwell suggested a number of facts the jury *could* have found that would justify a verdict in its favor. The trouble is that none of these *were* submitted to the jury as constituting acts that were either a breach of fiduciary duty or duty of loyalty. Many of the facts cited by Scanwell are not, *as a matter of law*, breaches of an employee's duty to her employer. For example, mere preparations to leave employment are not a breach of any duty. *See, e.g. Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d 742, 747 (Mo. App., E.D. 1993). Renting an office or entering into a business relationship to become active after termination of employment is not a breach of any duty to the employer. *See id*. Neither soliciting customers of the former employer nor soliciting employees of the former employer are violations of any duty. *See id*. Employees can agree to compete against their current employer in the future, and they can plan and prepare for such competition even while still employed. *See, e.g. National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 37 (Mo. banc 1966); *Pony Computer, Inc. v. Equus Computer Systems*, 162 F.3d 991, 998 (8th Cir. 1998)(applying Missouri law).

As a matter of good jury instruction practice, the specifications of acts supposedly constituting the breach of duty should have been in the instruction — not just a reference to some unspecified acts that were "included."

The use of the word "including" is not only lazy drafting but a warning signal that what follows is very likely going to be a roving commission. The word necessarily implies that what follows is only part of a larger group or category. *See* OXFORD ENGLISH DICTIONARY (online edition) at http://dictionary.oed.com/cgi/entry/00114352 (defining "include"). If leasing Scanwell's former office space (after it failed to renew it) and disclosing supposedly confidential information is part of the larger category of bad acts, what were the rest? The jury was left to supply its own answer without any guidance in the instructions. That's a roving commission. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d at 463. And that was reversible error.

Scanwell tried to justify the use of the word “including” by comparing it to the phrase “such as” that is found in MAI 21.05. That instruction, however, provides a definition of types of damages that may be awarded against health care providers. The theory of MAI has long been that the specific elements of damages are generally left to argument, *see, e.g.* MAI 4.01, except where the law requires the jury to consider specific elements, *see, e.g.* MAI 8.02. *See also* MAI, “Why And How To Instruct A Jury” at LXXII (6th ed. 2002). Instruction Nos. 7 and 12 were verdict directors — not damage instructions. The jury is required to be told what facts it must find in order to hold the defendant liable. The jury can’t be left to their own devices to tailor the law according to their own whims as to what defendants can or cannot do.

Scanwell also cited *State ex rel. Huffman v. Sho-Me Power Co-Op.,* 191 S.W.2d 971 (Mo. 1946) for the proposition that “including” *can* have a “restrictive” meaning. But restricted to what? Just the lease and the confidential information? If so, then the instruction should have said so. Moreover, later cases have made plain that the word “include” is ordinarily “not a word of limitation, but rather of enlargement. . . . When used in connection with a number of specified objects it implies that there may be others which are not mentioned.” *St. Louis County v. State Highway Commission,* 409 S.W.2d 149, 153 (Mo. 1966).

The question is how a reasonable juror would understand the use of the word in Instruction Nos. 7 and 12. The Court of Appeals concluded, correctly in our view, that a jury would interpret it expansively. That interpretation makes the two instructions roving commissions, and that requires a new trial.

VI.

The Trial Court Erred in Submitting Instruction No. 9 Defining "Fiduciary Duty" Because the Instruction Misstated Missouri Law By Stating That A Fiduciary Duty Between An Employer And Employee Arises When The Employer Merely "Reposes Trust And Confidence In Another" In That No Such Fiduciary Duty Exists Unless the Person Alleged to Have Breached the Duty Gains Superiority and Influence Over the Other.

The Circuit Court erred in submitting Instruction No. 9 which defined "fiduciary duty" as follows: "A fiduciary relationship is established when one reposes trust and confidence in another in the handling of certain business affairs." L.F. at 51. While certain employees, such as an officer or director of a corporation, owe their employer fiduciary duties as a matter of law, the ordinary employer-employee relationship does not give rise to any fiduciary duty in the traditional sense — particularly when the latter is an at-will employee. *See* Point I.

A simple employment relationship can rise to the level of a fiduciary relationship only where the employer reposes *special* trust and confidence in the employee such that she "gains superiority and influence" over the employer's business affairs that most employees don't have. *Shervin v. Huntleigh Securities Corp.*, 85 S.W.3d 737, 740 (Mo. App., E.D. 2002). Instruction No. 9 was an incomplete and erroneous statement of the law regarding fiduciary duty. This definition would make any person a fiduciary merely if the plaintiff unilaterally trusts that person, regardless of whether the person knowingly accepts a position of trust and confidence or has any actual influence over the employer's business affairs that exceeds the ordinary. Outside the context of receipt of trade secrets, a fiduciary duty arises only where the position of confidence and trust allows the putative fiduciary to gain superiority and influence over another.

The proper definition of fiduciary duty in the context of this case was proffered in Defendants' refused Instruction No. 9A, which provided:

> A fiduciary duty of loyalty arises where one party places trust in another *so that the latter gains superiority and influence over the former* or, as pertains to confidential information, when an employee acquires confidential information of his employer in such a way that he must have known of its confidential nature [emphasis added].

L.F. at 76.

Scanwell's sole argument in favor of its definition of fiduciary duty was that it was copied from *Lesh v. Lesh*, 718 S.W.2d 529 (Mo. App., E.D. 1986). *Lesh*, Scanwell says, didn't include in its definition the requirement that the defendant gain superiority or influence over the plaintiff as a result.

Scanwell is only half right. *Lesh* was an undue influence case. Whether the defendant gained superiority or influence over the individual (the defendant's mother) was an issue of fact for the trier of fact to determine. *See id*. at 533. Thus, it was an element of the plaintiff's case to prove that the defendant had influence over his mother and exercised it improperly. That's why *Lesh* didn't include that element in its *definition* of confidential relationship (actually, the opinion never mentions fiduciary relationship, but for these purposes, we assume it's the same).

The proper and full definition is found in cases such as *Shervin v. Huntleigh Sec. Corp.*, 85 S.W.3d 737, 740-741 (Mo. App., E.D. 2002) and *Horwitz v. Horwitz*, 16 S.W.3d 599, 603 (Mo. App., E.D. 2000) which require not only a showing that the party claiming the existence of a fiduciary duty placed trust and confidence in the other, but also that the party supposedly owing the duty in some fashion gained influence or superiority over the plaintiff. Trustees, corporate officers and directors, and attorneys have, as a matter of law, special influence or superiority over a beneficiary's, shareholders' or client's affairs. A mere employee does not.

Scanwell didn't even try to distinguish or explain why these cases are wrong, either at trial or on appeal. Its principal argument was that defendants' proposed definition (and that accepted by the Court of Appeals) was too restrictive because it would allow any employee who reported to a superior to escape from owing fiduciary duties to their employer. As discussed in Point I, that statement is largely a correct description of the typical employment relationship, even one between a corporation and its middle management. They owe a duty of loyalty — they cannot act directly contrary to the company's interests while employed there — but they have a great deal of freedom (that no true fiduciary ever has) to act on their own interests in preparing to leave and compete with their current employer.

Merely trusting an employee does not make her a fiduciary. Presumably, all employers trust their employees with tasks great and small. That hardly makes every employee a fiduciary. Here, for example, one of the claims of breach of fiduciary duty was that Chan failed to remind her employer of its legal rights and obligations under the office lease. But Chan wasn't even trusted to obtain and sign the lease on her own. She had to submit it to her superiors in Chicago for approval — just as she had to submit every other significant decision affecting the office down to the giving of raises for the employees she supervised.

If Scanwell had given Chan complete authority to negotiate and sign the lease without approval from higher-ups, *that* might have been reposing special trust and confidence in her such that she gained superiority and influence over Scanwell with respect to the office lease. But Scanwell trusted her only so far, and not far enough to make her a fiduciary as to its office lease or other business affairs.

The definition of fiduciary duty in Instruction No. 9 was incorrect. This wasn't just a technical error, but one that tainted the verdict because it allowed the jury to conclude that a fiduciary duty existed based solely upon Scanwell's subjective claim that it trusted Chan. She was the manager of the St. Louis office, but she was only an employee, not an officer or director. The latter have fiduciary duties as a matter of law. *See Zakibe*, 28 S.W.3d at 382. For Chan's actions to be actionable as a breach of fiduciary duty, plaintiff had to show more than that it trusted her — it had to show that she thereby acquired some special power over Scanwell's affairs beyond her usual duties as its employee.

VII.

The Trial Court Erred in Denying Dimerco's Motion for Judgment Notwithstanding The Verdict Because Scanwell Failed to Make a Submissible Case of Conspiracy Against Dimerco in That It Failed to Present Any Evidence of a Conspiracy Concerning the Lease, Inasmuch as It Was Undisputed That Anthony Tien, Who Signed the Lease on Behalf of Dimerco, Was Unaware That He Was Leasing the Same Space Previously Occupied by Scanwell, and It Was Undisputed That Kurt Brydenthal, Who Authorized Ms. Chan to Obtain a Lease for Scanwell, Did Not Do So Until After Learning That Scanwell Had Failed to Renew Its Lease.

As discussed above, Scanwell presented no evidence that Stevie Chan breached any fiduciary duty of loyalty concerning the office lease or that Scanwell was damaged by any such alleged breach. This reason was independently sufficient to justify a directed verdict and a JNOV on Scanwell's derivative conspiracy claim in Count II.

Even assuming *arguendo* that Scanwell had presented evidence of a breach of fiduciary duty and resulting damages with respect to the office lease, Scanwell presented no evidence of any unlawful conspiracy concerning the lease. "It is said in this state that a conspiracy must be proved by clear and convincing evidence." *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 50 (Mo. banc 1966) (reversing judgment on conspiracy claim because plaintiff failed to present clear and convincing evidence of conspiracy). "If the proof . . . is such that it is as consistent with honesty and good faith as with a fraudulent purpose, it will be referred to the better motive." *Id.*

Ms. Chan's business proposal (Pl. Ex. 6) and the chronology in Mr. Tien's February 21, 2001 e-mail to his superiors (Pl. Ex. 1) is the evidence on which Scanwell placed the greatest emphasis. Considered in the light most favorable to Scanwell, these documents and the other evidence introduced at trial suggest, at most, that Dimerco and Ms. Chan agreed to set up an office from which to operate a freight forwarding business in competition with Scanwell. As discussed above, the law provided them an unequivocal right to do so.

Dimerco was free to lease Scanwell's former office space once Scanwell chose not to renew the lease, even if Dimerco had known that the lease was for the same office space. However, Tien, who signed the lease on behalf of Dimerco (*see* Pl. Ex. 7), testified that he was unaware when he signed the real estate lease that it was for the same space Scanwell had previously occupied. T. 242-244.

Tien's testimony in this regard was uncontroverted. Scanwell presented no evidence that Tien knew that the lease was for the same office space when he signed it, or that Dimerco encouraged Chan to conceal from Scanwell its obligation to renew the lease if it wanted to keep the office space. The only evidence on the subject was that Kurt Brydenthal was the sole person from Dimerco who knew that the lease was for the same office space. T. 600-603. But Brydenthal instructed Chan to secure a lease on behalf of Dimerco only after he found out that Scanwell did not renew its lease of he space. T. 600-603.

There simply was no evidence of any unlawful conspiracy between Dimerco and Chan to misappropriate Scanwell's lease. Under *Trieman*, absent clear and convincing proof of an unlawful conspiracy, and especially given that the proof is at least as consistent with honesty and good faith as with a bad motive, Dimerco was entitled to a directed verdict, JNOV, or new trial on the conspiracy claim in Count II.

The trial court erred in denying Defendants' Motion for Directed Verdict and Motion for JNOV or, in the Alternative, New Trial.

CONCLUSION

Stevie Chan did not owe Scanwell any fiduciary duties. While she owed a duty of loyalty, there was simply no evidence that she breached it. Chan was careful to confine her preparations to leave and compete with Scanwell to actions that have been approved by this Court for at least four decades. There is no fiduciary "duty to remind" one's employer of its legal rights and obligations under a lease the employer had in its own possession three years – particularly where the employee is a non-lawyer, at-will employee who lacked the authority to enter into the lease on her own, let alone renew it without home office approval. The so-called "confidential" information wasn't ever a secret from Scanwell's other competitors because the customer to which it related handed it out as a bargaining chip to get better prices. Chan having done nothing wrong, Dimerco's liability (being entirely derivative) was likewise not established. The Court should reverse the judgment outright.

Alternatively, the Court should grant a new trial. The verdict directing instructions and definitions were hopelessly muddled. They allowed the jury to find that defendants "took over" Scanwell's business on any ground nine of them could agree upon, whether submitted or not, even if they found that Chan was only a "trusted" employee.

The jury's confusion was evident in its damage award. Neither figure had any rational relationship to the alleged breaches of duty. Chan was free to work for Dimerco and before she left the St. Louis office was profitable. She shirked no duties she owed to Scanwell before she left its employment. So what was the basis for taking away one year's salary of $54,000? Dimerco's only liability as ultimately found by the jury was the joint and several liability of an alleged co-conspirator. Despite its essentially derivative liability (as submitted in the conspiracy instruction), Dimerco was tagged with an additional $200,000 in damages.

As if these reasons were not enough to grant a new trial, we have a closing argument that baldly and without apology asked the jury to conclude that the defendants were liable because they hired two "large" law firms to represent them. There are no "big" or "little" law firms, no "big" or "little" parties, no "rich" or "poor" people in the courtroom. They are all equal before the law and deserve to be treated that way.

For the foregoing reasons, Appellants Stevie Chan and Dimerco Express (U.S.A.) Corp. respectfully request that this Court grant judgment in their favor notwithstanding the verdicts, grant a new trial, or, in the alternative, grant a remittitur on the verdict against Dimerco to reduce the verdict to no more than $54,000.00.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 15,998 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2000 in 13 pt. Times New Roman font; and includes a virus free 3.5” floppy disk in Microsoft Word format.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief and one, virus-free diskette, containing an electronic copy of the brief, was mailed first class, postage prepaid, this ___ day of August, 2004 to:

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APPENDIX

Tab	Description
A1	Judgment
A3	Order denying Motion for Directed Verdict
A4	Order denying post-trial motions
A5	Jury Instruction No. 7
A6	Jury Instruction No. 12
A7	Jury Instruction No. 9